

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	FINAL ORDER
89459-s76H BY JOSEPH PAUL)	
SCHRADER, JR.)	

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the March 13, 1995, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Application for Beneficial Water Use Permit 89459-s76H by Joseph Paul Schrader, Jr. is **DENIED**.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

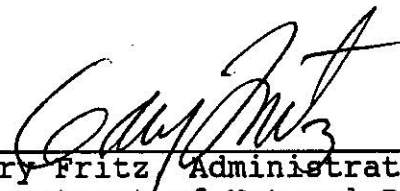
If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part

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of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for the ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the oral proceedings to the district court.

Dated this 13 day of April, 1995.



Gary Fritz, Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record first class mail at their address or addresses this 14th day of April, 1995 as follows:

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P.O. Box 521
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(via electronic mail) .

Mary Jean Beaman Trust
36 Brookside
Missoula, MT 59802

Vivian A. Lighthizer,
Hearing Examiner
Department of Natural
Resources & Conservation
1520 E. 6th Ave.
Helena, MT 59620-2301


Cindy G. Campbell
Hearings Unit Legal Secretary

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	PROPOSAL
FOR BENEFICIAL WATER USE PERMIT)	FOR
89459-s76H BY JOSEPH PAUL)	DECISION
SCHRADER, JR.)	

* * * * *

Pursuant to the Montana Water Use Act and the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on February 14, 1995, in Missoula, Montana, to determine whether a Beneficial Water Use Permit should be granted to Joseph Paul Schrader, Jr. for Application for Beneficial Water Use Permit 089459-s76H under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (5) (1993).

APPEARANCES

Applicant Joseph Paul Schrader, Jr. appeared at the hearing *pro se*.

Objectors Jim and Robert W. Schroeder appeared at the hearing by and through Robert W. Schroeder.

Objector Mary Jean Beaman appeared at the hearing by and through Ann Ranf, Tom Maclay, and Ted Delaney.

Bruce Anderson, Hydrologist with Land and Water Consulting, Inc., appeared at the hearing as a witness for Objector Mary Jean Beaman.

Objectors Billie J. and Alice Walton appeared at the hearing by and through Billie J. Walton.

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Karl Uhlig and Jerry Reddig, Water Resources Specialists with the Missoula Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), appeared at the hearing.

EXHIBITS

Applicant offered no exhibits for the record. Objector Beaman offered two exhibits for the record which were accepted without objection.

Objector Beaman's Exhibit 1 is a one-page copy of a computer printout listing water users of various streams including North Woodchuck Creek.

Objector Beaman's Exhibit 2 is a bound surface water investigation report produced by Land and Water Consulting, Inc., entitled *North Fork Woodchuck Creek*.

The Department file was made available for review by all parties who had no objection to any part of it. Therefore, the Department file is accepted into the record in its entirety.

PRELIMINARY MATTERS

At the beginning of the hearing Applicant reduced the proposed flow rate from 30 gallons per minute to five gallons per minute.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

1. Applicant filed Application 89459-s76H with the Department on April 28, 1994, at 2:30 p.m. (Department file.)

2. Pertinent portions of the application were published in the *Missoulian*, a newspaper of general circulation in the area of the source, on September 28, 1994. Additionally the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the proposed appropriation. Three timely objections were received by the Department and Applicant was notified of the objections by a letter from the Department dated October 28, 1994. (Department file.)

3. Applicant seeks to appropriate five gallons per minute up to .83 acre-foot per year of the waters of an unnamed tributary of North Woodchuck Creek (proposed source) for domestic use and .02 acre-foot of water per year for irrigation of 14 trees in the N $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 26, Township 11 North, Range 19 West, Missoula County.¹ The proposed point of diversion is in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 26. The proposed means of diversion is a Homelite two-inch centrifugal pump with a manual throttle. The conveyance means would be a one-inch rubber hose. The water would be piped to a 1,000 gallon storage tank. Water would then be taken from the storage tank by a common garden hose to irrigate the 14 trees and to the house for certain domestic

¹Unless otherwise stated all land descriptions in this Proposal are located in Township 11 North, Range 19 West, Missoula County.

uses excluding preparation of food or for human consumption. The proposed period of diversion is from January 1 through December 31, inclusive of each year. (Department file and testimony of Applicant.)

4. Applicant measured the flow in the proposed source on April 20, 1994, at 30 gallons per minute; on May 15, 1994, the flow was 20 gallons per minute; on June 11, 1994, the flow was 10 gallons per minute; on July 3, 1994, the flow was 7.5 gallons per minute; and on July 21, 1994, the flow was 6.00 gallons per minute. The flow in the proposed source at a point in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 26 was three gallons per minute on November 17, 1994, as measured by Karl Uhlig and Jerry Reddig. On November 30, 1994, Bruce Anderson measured the proposed source at 2.25 gallons per minute at a point in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 27. On November 17, 1994, the flow of North Woodchuck Creek was 20.00 gallons per minute at a point in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 27, approximately 150 to 200 yards upstream of the confluence with the proposed source, as measured by Mr. Uhlig and Mr. Reddig. (Department file, testimony of Applicant and Bruce Anderson, and Objector Beaman's Exhibit 2.)

5. Applicant owns the proposed place of use. (Department file and testimony of Applicant.)

6. Applicant would not appropriate every day. He would pump water from the proposed source only when the 1,000 gallon tank was empty. (Testimony of Applicant.)

7. Water flows in the proposed source at the proposed point of diversion in the amount of 6.00 to 30.00 gallons per minute from April through July. Excess flows occur generally five or six weeks during May and June. Low flows are from mid-June to the first of the year. (Department file and testimony of Applicant, Bruce Anderson, and Tom Maclay.)

8. There is an alluvial fan located approximately in the center of Section 27. North Woodchuck Creek flows along the toe of the alluvial fan. The proposed source is a perennial stream which flows into the head of the alluvial fan. Water from the proposed source does not, as a rule, flow into North Woodchuck Creek on the surface. It does, however, contribute to the flow of North Woodchuck Creek with underground flow through the alluvial fan. (Testimony of Bruce Anderson and Objector Beaman's Exhibit 2.)

9. Objectors Walton hold the most senior right on North Woodchuck Creek. That right is claimed by Statement of Claim 76H-W148063. The claimed priority date is May 14, 1886. The flow rate claimed is 277 gallons per minute for irrigation of approximately 20 acres. Waltons' point of diversion is located near the confluence of North Woodchuck Creek and Woodchuck Creek slightly over one-half mile from the Bitterroot River. The only time 277 gallons of water per minute can be taken from North Woodchuck Creek at Objectors Walton's point of diversion is five or six weeks during May and June. It is difficult for Objectors Walton to understand how, if they have the first water right on

North Woodchuck Creek and are getting the least amount of water, the Department could grant any more water rights higher up on the proposed source. (Department records and testimony of Billie Walton.)

10. Objectors Schroeder own the property directly west of the meadow and continuing in a southerly direction. They have an 1,800 acre pasture used for grazing up to 350 cattle. They have spent considerable funds in the past few years moving some of the North Woodchuck Creek water off the creek to help both with pasture distribution for the cattle and riparian management to keep the cattle out of the creek. They have installed a leach field pickup¹ with a series of stock water tanks distributed throughout the pasture.² Last year (1994) there were times when the creek was flowing so little that there was no water for the Schroeders' cattle and no water for the downstream neighbors' cattle. The Schroeders hold Statement of Claim 76H-W108812 which claims a right to appropriate 1.89 cubic feet per second or 848.23 gallons per minute of the waters of North Woodchuck Creek for irrigation of 50.00 acres which is far more than the amount

¹The leach field pickup is a perforated culvert installed vertically beside the creek to divert the underflow of the creek and distribute it to the various stock tanks.

²There is no record of an application to change appropriation water right filed by the Schroeders to change the means of diversion and the place of use for any stock water right the Schroeders may have. If, indeed, there has been no filing, the Schroeders must either file such an application or cease using the water as changed.

of water that flows in the creek. (Department records and testimony of Robert Schroeder.)

11. Objector Mary Jean Beaman Trust as part of the original Maclay holdings has long had a livestock operation dependent upon the source for livestock water. It happens and continues to happen, as it did in 1994, that the entire drainage is depleted even for stock water. The water barely reaches the stock water point of diversion which limits the number of cattle and the time cattle can be kept in that pasture. A grazing rotation has been established to make the most of the pasture and available water. North Woodchuck Creek is an integral part of that rotation system. The upstream diversions in the North Woodchuck Creek basins are detrimentally impacting the water rights held by Mary Jean Beaman Trust. (Department records and testimony of Tom Maclay.)

12. There are no pending permits or developments for which water has been reserved in the source of supply. (Department file and records.)

13. There were no objections to this project concerning water quality. (Department file.)

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. See Findings of Fact 1 and 2.

2. The proposed uses of water, irrigation and domestic, are beneficial uses of water. See Finding of Fact 3.

3. Applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. See Finding of Fact 5.

4. Applicant is not required to prove no adverse effect to water quality or the ability of a discharge permit holder to satisfy effluent limitations. See Finding of Fact 13.

5. Applicant has not provided by a preponderance of evidence the proposed appropriation will not adversely affect the water rights of a prior appropriator. See Findings of Fact 9, 10, and 11.

6. Applicant has not provided by a preponderance of evidence there are unappropriated waters in the source of supply at the proposed point of diversion at times when the water could be put to the use proposed or that during the period Applicant seeks to appropriate, water is reasonably available in the amount Applicant seeks to appropriate. See Finding of Fact 3, 4, 8, 9, 10 and 11.

7. An applicant is required to show by a preponderance of evidence that all the criteria necessary for issuance of a permit have been met. Since Applicant in this matter has failed to demonstrate that there will be no adverse effect to prior water users and that there are unappropriated waters in the proposed source, no finding is necessary as to whether the proposed use

will interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. *See In re Application 53221 by Carney and In re Application 61333 by Pitsch.*

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Application for Beneficial Water Use Permit 89459-s76H by Joseph Paul Schrader, Jr. is DENIED.

NOTICE

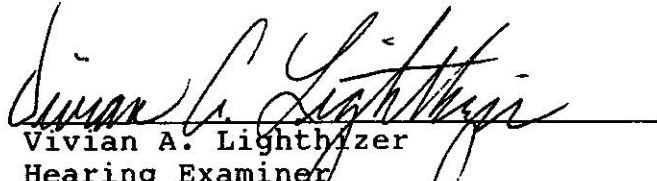
This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

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Dated this 13th day of March, 1995.


Vivian A. Lighthizer
Hearing Examiner
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and Conservation
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(406) 444-6615

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 14th day of March, 1995, as follows:

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Cindy G. Campbell
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